

Permanent Exclusions: The School Exclusion Guidance explained

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Exclusion – Some Statistics

- 1% of excluded pupils will go on to get 5 GCSEs at A*-C.
- Social cost of exclusion is £370,000 per young person in their lifetime
- In 2015-16, 475 under 7s were permanently excluded (50 4-year-olds).
- Pupils with SEN are 7x more likely to be permanently excluded than pupils with no SEN;
- In 2015-2016 there were 6,675 permanent exclusions. Of those that went to IRP (460), only 20 pupils were ultimately reinstated at the end of the process.

Head Teachers: the Law on Exclusions

- Permanent exclusion should only be used as a last resort (Key Points, Bullet 3).
- **Must** be on disciplinary grounds [para 1] – it is unlawful to exclude a child “*simply because they have additional needs or a disability that the school feels it is unable to meet, or for a reason such as: academic attainment / ability.*” [para 13].
- NB “Unofficial exclusions” (e.g. sending a child home “to cool off”) = unlawful exclusions, even if the parent agrees [14].

Behaviour Outside the School

- The behaviour of pupils outside school *can* be considered as grounds for exclusion [para 4].
- However this is only where the misbehaviour (Behaviour and Discipline in Schools Guidance, Jan 2016, para 25):
 - Happens when the child is identifiable as a pupil of school (e.g. wearing school uniform); or
 - could have repercussions for the orderly running of the school; or
 - poses a threat to another pupil or member of the public; or
 - could adversely affect the reputation of the school.

The test for permanent exclusion

- Permanent exclusion only [16]:
 - in response to a serious breach or persistent breaches of the school's behaviour policy; AND
 - where allowing the pupil to remain in school would seriously harm the welfare of the pupil or others in the school.

SEN Exclusions – The Guidance

- HTs should, as far as possible, avoid permanently excluding any pupil with an EHC Plan [23].
- Schools should engage proactively with parents in supporting pupils with SEN [24].
- Where a school has concerns about the behaviour, or risk of exclusion, of a child with SEN it should consider what additional support or alternative placement may be required. This should involve assessing the suitability of provision for a pupil's SEN. Where a pupil has an EHC plan, schools should consider requesting an early annual review or interim/emergency review [25].

Duties on the Governing Body

- The GB must meet to consider reinstatement when a pupil is permanently excluded within 15 days [55].
- The following must be invited to the GB meeting and be allowed to make representations [58]:
 - parents;
 - the HT;
 - a representative of the LA (maintained school or PRU).

GB's Decision

- The GB panel applies the civil standard of proof (on the balance of probabilities) when determining if facts are made out [65].
- GB should consider whether the decision to exclude the pupil was lawful, reasonable and procedurally fair, taking account of the head teacher's legal duties and the evidence presented [71].
- The GB can either [66]:
 - decline to reinstate the pupil and uphold the exclusion; or
 - direct reinstatement of the pupil immediately or on a particular date.

IRP or FTT if unsuccessful at GB?

- In a 2014 study of parents of children with SEN, 95% went down IRP rather than FTT route – most common reason why was that they “*had seen the FTT as the last resort*”.
- However, by the time they had got through the IRP, they felt too emotionally drained to be able to go through another appeal process, and had concerns about the length of time it would take to complete a further appeal, disrupting their child's education in the meantime.
- My strong advice is to go down the FTT route first – more likely to secure positive outcome (FTT can order reinstatement; IRP cannot); time taken similar in practice as FTT applies an expedited timetable in a permanent exclusion case so the decision can be reached in no more than six weeks.

Independent Review Panel (“IRP”)

- The time frame to apply for an IRP is [88]:
 - within 15 school days of notice being given to the parents by the GB to uphold the exclusion; OR
 - within 15 school days of the final determination of a claim of a discrimination claim in relation to the exclusion.
- IRP to be arranged by the LA or (in the case of an Academy) the Academy Trust (“AT”) at their own expense [87], and at a private venue (unless the panel directs otherwise) [94].
- IRP must begin within 15 school days of the parent’s application (although there is a power to adjourn) [92].

Who will be at the IRP

- Chair (may or may not be legally qualified; if not the clerk may be legally qualified);
- Two lay members;
- Clerk;
- SEN expert (if requested);
- LA representative (for maintained schools);
- HT and a representative from the GB.

Witnesses and Evidence

- Pupil witnesses: generally more appropriate to rely on witness statements [116].
- Witness statements [118]:
 - attributed, signed and dated unless school has a good reason to protect the anonymity of a witness;
 - where anonymous, should be dated and labelled in a way that distinguishes it from other statements;
 - pupil entitled to know the case against them.
- • Written evidence [120]:
 - policies and documents GB would reasonably have been expected to take account of.

Appointing a SEN Expert

- **When?**

- If requested by parents in application to IRP (regardless of whether school thinks child has SEN) [125], [128].

- **Who?**

- For LA/AT to decide but should take reasonable steps to ensure parents have confidence in their impartiality and capability [133].
- Professional with first-hand experience of assessment and support of SEN and understanding of schools' legal requirements re: SEN and disability [131].
- Examples: educational psychologist; specialist teacher; SENCo [131].

Duties of the SEN Expert

- SEN expert's advice: were school's policies which relate to SEN and their application to the pupil lawful, reasonable and procedurally fair? [165]
- View should be based on the evidence provided to the IRP; their role is not to assess the child [164].
- The SEN expert should not criticise a school's policies or actions simply because they believe a different approach should have been followed [167].

IRP Powers – an Overview

- IRP's powers [138]:
 - 1. **uphold** the exclusion decision;
 - 2. **recommend** the GB reconsiders their decision; or
 - 3. **quash** the decision **and direct** that the GB considers the exclusion again.
- IRP has no power to order reinstatement.
- IRP has power to order a financial readjustment to school's budget/payment to LA – but not payment to parent.

IRP: Reaching a Decision

- IRP's task [136]:
 - to review the GB's decision not to reinstate the pupil (not to decide whether the HT was right to exclude the pupil).
 - it must consider the interests and circumstances of excluded pupil, including the circumstances in which he was excluded, and have regard to the interests of other pupils and people working at the school.
- IRP focuses on the *decision-making process* rather than the decision itself; it does not make a full reconsideration of the “merits” of the decision.

The Three Grounds for quashing – and questions IRP asks itself to see if they are satisfied [159]

- 1. Illegality – did the governing board act outside the scope of its legal powers in deciding that the pupil should not be reinstated?
- 2. Irrationality – (2a) did the governing board rely on irrelevant points, fail to take account of all relevant points, or (2b) make a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it?
- 3. Procedural impropriety – was the governing board's consideration so procedurally unfair or flawed that justice was clearly not done?

1. Illegality

- Unlawful discrimination may be argued at IRP whether or not parent goes to FTT.
- However, illegality ground usually relied upon where there has been a failure to comply with the School Exclusion Guidance.

2(a) Relevant/Irrelevant Points

- It is common sense that GB must have regard to all legally relevant points and not have regard to any legally irrelevant points.
- The Guidance helpfully assists in identifying mandatory relevant points e.g. *“the interests and circumstances of the excluded pupil, including the circumstances in which the pupil was excluded”* [63].
- Irrelevant points might be behaviour at previous school: I had a case where child previously attended a different academy within the multi-academy trust and HT put school record at previous academy before GB. Irrelevant as exclusion only for breaches of *the* school’s behavioural policy (i.e. the school being attended)).

2(b) – *Wednesbury* Irrationality

- *“a decision so unreasonable that no governing board acting reasonably in such circumstances could have made it”.*
- This is a high hurdle and a very difficult ground to succeed on: the fact that the IRP itself would not have excluded is not enough to make the original decision “irrational”.
- Example 1: GB upheld an exclusion of a child for theft when no evidence at all that she was responsible.
- Example 2: GB upheld an exclusion of child A for theft when all the evidence suggested child B was responsible.

3. Procedural Impropriety - consideration so flawed that justice clearly not done

- To succeed on this ground, need to show not just a breach of minor points of procedure but something more substantive that had a significant impact on the quality of the decision-making process [160].
- Judgment for the panel, but examples [160]:
 - bias (e.g. HT and GB met to discuss exclusion without parents present);
 - failing to notify parents of the right to make reps;
 - the GB making a decision without have given parents the opportunity to make reps;
 - failing to give reasons;

Note on the pupil's record

- The panel can direct the governing board to place information on the pupil's educational record [151].
- The governing board must comply with any direction of the panel to place a note on the pupil's educational record [151].
- The clerk must also note, where a pupil is not reinstated following a direction to reconsider, the exclusion does not count towards the rule that an admission authority may refuse to admit a child who has been excluded twice [174] (this is v important in certain cases).

Evidence considered by IRP - quashing

- When determining whether to quash the decision, the IRP should only take account of the evidence available to the GB at the time of the decision not to reinstate [143].
 - this includes any evidence which the IRP considers would, or should, have been available to the GB had it acted reasonably.
 - E.g. the evidence of a material witness that the school failed to interview or relevant policies.

Evidence considered by IRP – recommending reconsideration

- New evidence (but not new reasons for the exclusion or the decision not to reinstate) may be presented to the IRP [142]
- Evidence presented to the IRP which it considers it is unreasonable to have expected the GB to have been aware of at the time of its decision is taken into account by IRP when deciding whether to recommend that the governing board reconsider reinstatement [144].
- NB. The Route to challenge an IRP Decision is by JR

Thank you

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